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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ALAN LITTMAN, Defendant and Appellant.	A143133 (Contra Costa County Super. Ct. No. 130778-4)

Disputes between neighbors can be among the most prolonged, petty, and downright nasty of all litigation. (See, e.g., *Griffin v. Northridge* (1944) 67 Cal.App.2d 69, 71–73.) Such disputes can become notoriously bitter, sometimes even providing the motive for murder. (See *People v. Garcia* (2005) 36 Cal.4th 777, 782–783.) There was no murder here, but there was voluntary manslaughter. Emotion conquered reason leading to the totally avoidable, and utterly pointless, death of Doris Penico.

The trial court ruled the evidence of the feud's history was legally insufficient to support a conviction for first-degree murder. And the jury acquitted defendant Michael Alan Littman of second-degree murder. But it did convict him of the voluntary manslaughter of Mrs. Penico. (Pen. Code,[1] § 192, subd. (a).) The jury also convicted defendant of stalking Mrs. Penico (§ 646.9, subd. (a)) and assaulting her husband, Victor Penico, by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The

[1] Statutory references are to the Penal Code unless otherwise indicated.

trial court sentenced defendant to state prison for an aggregate term of four years and eight months.

Defendant attacks his manslaughter conviction as not supported by substantial evidence and also infected by instructional error. He further contends the trial court twice erred in excluding exculpatory evidence. We conclude defendant has failed to establish error, much less prejudicial error. Thus, we affirm.

BACKGROUND

In accordance with standard appellate procedure, we view the record most favorably to the prosecution, and in support of the jury's determination that defendant was guilty. (E.g., *People v. Mendoza* (2016) 62 Cal.4th 856, 883; *People v. Maury* (2003) 30 Cal.4th 342, 403.)

Topography appears to have a central role in this tragedy. The setting is two adjacent residences in a gated community located in Alamo. The two residences share a single narrow T-shaped driveway. To leave, a car was required to back out of the respective garage onto the opposing property before being headed down the steep driveway. Each residence had an easement for this limited purpose.

In 2004, the Littmans bought the house at 3030 Stonegate Drive opposite the Penicos, who had been at 3036 Stonegate since 2000. Friction was apparently instantaneous.

When the Littmans moved in, their new home was apparently not yet finished, and the Littmans soon had a construction crew on the site to complete work. That took about six months, whereupon the Littmans began extensive landscaping, which took several more months. All of this entailed constant and considerable vehicle traffic, which, in Mr. Penico's opinion, meant that their easement on the Littmans' property was "blocked almost continuously." Moreover, another person, with another vehicle, moved in with the Littmans for about a year. Requests by the Penicos to move the vehicles to permit passage, were fruitless.

It appears that face-to-face communication—if it ever existed—quickly ceased, and the Penicos spoke with the Littmans only by cell phone (which message calls were

not returned) and by written notes left on Littman vehicles. Interaction between the Littmans and the Penicos took even more unorthodox forms. According to Mr. Penico: "There were occasions where a delivery truck . . . was coming and we would ask them could they stop or back down to let us out," but "when we did that, Mr. Littman came out of the house, running and screaming and saying, You don't need to listen to her [i.e., Doris Penico]. She's crazy. Don't move."

There were times when the Penicos were unable to leave their house. Mr. Penico testified that he felt intimidated by defendant, and "avoided him at all costs." Mrs. Penico was afraid of Mr. Littman. Son Edward Penico, who was in school when his family moved in, testified that neither of the Littmans ever introduced themselves, said hello or made a friendly comment. When Edward came home from college, his mother felt afraid for her personal safety outside the house when Mr. Littman was present. All defendant did was stare wordlessly at the Penicos when they came outside.

The ensuing years generated a rich history of animosity, slights real or perceived, tit for tat retaliations—and unrelenting bitterness. It would unduly prolong this opinion to set out a catalogue of incidents, recounted at laborious length by Mr. Penico, his son Edward, and defendant's wife. One point is significant: in April 2011, the Penicos installed a digital recording surveillance system because "interactions with Mr. Littman caused [them] to be in fear for [their] safety," including almost being run over by defendant accelerating his car while the Penicos were on the driveway gardening, and because police refused to intervene unless "we had some evidence so it wasn't just our word." This prompted defendant—and, to a lesser extent, Mrs. Littman—to constantly position himself near the Penicos and record their movements with a cell phone camera. Defendant also followed and filmed workers who came to the site for the Penicos. Mrs. Penico's fear of defendant was noticed by one worker, and by the person who installed the surveillance system.

In late summer of 2011, the Penicos learned that the Littmans were planning a new round of remodeling. Letters from the Penicos' attorney protesting the Littmans' misuse

of their easement and preventing the Penicos from using their easement, were ignored. The Littmans' remodeling work was nearing its end when August 27, 2012 dawned.

At about 11:00 a.m., Mrs. Penico wanted to drive off the property in the family station wagon. Mr. Penico testified he was working inside the house when he received a phone call from his wife asking him to "come down." Emerging from his house, he observed his wife's car "was backed halfway or part way up, but into the easement area, the door was open. She appeared to have been talking to Mr. Littman and she told me he was harassing her." Defendant was standing nearby "holding an iPhone and filming or taking photographs of Doris." Defendant paid no attention to Mr. Penico's requests that he stop this "harassing" behavior. Mr. Penico "held my hand in front of the lens of the camera or the phone," but defendant, who "was impassive and nonresponsive . . . kept filming Doris."

According to Mr. Penico, defendant suddenly shouted "You are attacking me," or "You're hitting me." The next thing he remembered was being "stunned" by "a powerful blow" to his head. Further blows forced him to "back up, and then I turned to flee." "I ran down the driveway [where] the car was—backed up on the driveway. The [driver's] door was open. Doris had gotten out . . . and that's the direction in which I ran." "[S]hortly before I came abreast of her," "I saw peripherally Mr. Littman's hand reach down and strike her in the chest, and I saw her fall backwards." "[I]mmediately after that I was aware that I was on the ground, prone on the driveway, further down the driveway from Doris. . . . And Mr. Littman basically jumped on me and started attacking me." "I was aware that he had run down and pursued me, and . . . he was beating me about the head and about the ribs," while "shouting things like, you're attacking me, you're hitting me." "[A]t a certain point he just stopped abruptly and stood up. Continued to shout some of those things like, Don't ever hit me, and then he just walked off."

Mr. Penico continued his version: "I was sort of stunned by the ferocity of the attack and . . . that it had come out of nowhere." Aware that he was bleeding freely, Mr. Penico went to his wife "lying on the ground . . . her head pointed down the driveway." "She was making moaning noises, but she . . . never responded to anything I said" and

never regained consciousness. Noticing that his wife was bleeding from her head, Mr. Penico stripped off his shirt and put it under her head. He then called 911.

Doris Penico was admitted to John Muir Hospital with multiple fractures of the skull and extensive intracranial bleeding. The consulted neurosurgeon's opinion was "this was not a survivable injury." And so it proved: she died on August 28. The physician who performed the autopsy testified he had performed 7,000–8,000 such examinations, and did not recall a fractured skull "as severe as this [one]" with so much bleeding.

Inside his home, defendant told the responding officer "he was videotaping a vehicle backing out from the Penico's house." The vehicle was being driven by Doris Penico. When she observed defendant videotaping her, she stopped the car, exited it, and began yelling at him. Mr. Penico appeared, joined in his wife's yelling, and then "tackled him [defendant] in the driveway of his house." Defendant showed the officer the videotape on his iPad, but it did not show any altercation. Defendant told the officer he was not afraid of Mr. Penico. Defendant was videotaping at his attorney's instruction.

Defendant repeated to another officer that "he was instructed by his attorney to film any and all interactions with his neighbors, the Penicos." Defendant told this officer that he started to film Mrs. Penico as she backed up her car in the easement area. She exited the car, told Littman to stop filming. She was joined by Mr. Penico, with the same command. When defendant ignored commands to stop filming, "Mr. Penico attacked him" while Littman was standing "on his property by the garage door." Penico and Littman exchanged punches, and at one point fell to the ground together. The two of them then "rolled into" Mrs. Penico, at which point Littman went into his home.

A deputy sheriff who was told to collect defendant's cell phone found defendant inside the house. "[H]e was on a phone and he was working at his computer. And the iPhone was there . . . connected to his computer." Defendant stated "he was speaking to Apple support."

Soon after he was arrested and booked in the county jail on August 30, defendant called his wife and told her where his cell phone was located. Mrs. Littman subsequently told defendant she had retrieved it.

Defendant did not testify. His version of events was presented by his wife. Terry Littman testified that the final confrontation began when defendant drove up the driveway. Mrs. Penico was "hollering" at defendant about his photographing her. She saw Mr. Penico walked "onto our driveway" and "get nose-to-nose with Michael." The Penicos were "both very agitated" and yelling at defendant, who was "just standing there." Mrs. Littman had turned away to call 911 when "I heard my husband yell, Why did you hit me?" "[A] couple of seconds later I heard Mrs. Penico scream and then they were into the bushes, the two men." "[A]t one point" Mrs. Littman saw "Mrs. Penico with her arms up" while "the two men" were "on the ground."

Defendant also presented the brief testimony of two witnesses, a husband and wife who knew the Littmans. Their testimony was to the effect that Mrs. Penico was zealous to the point of obnoxiousness about enforcing the sanctity of her easement.

REVIEW

Substantial Evidence Supports the Conviction for Voluntary Manslaughter

Defendant makes no claim that the jury was misinstructed *on the law of voluntary manslaughter*. The parties agree that a valid conviction for voluntary manslaughter requires substantial evidence that the accused harbored a conscious disregard for life. (See *People v. Bryant* (2013) 56 Cal.4th 959, 968–969.) Defendant contends that the record on appeal does not have that quantum of evidence. Indeed, defendant goes further and insists that the evidence is conclusive on this point and conclusive in his favor. Specifically, he contends that the "testimony of Victor Penico, the only percipient witness" is legally worthless: "By his own account, Mr. Penico was not able to reliably perceive any contact Mr. Littman did or did not make with Mrs. Penico." "But what dooms Mr. Penico's claim for *legal sufficiency* purposes is the recorded evidence itself. The video and the still photographs conclusively establish that as Mr. Penico is coming

down the driveway and is nearly abreast of Mrs. Penico—the instant he purportedly saw Mr. Littman's hand strike her—Mr. Penico is turned well to his right, towards the side of the car, and certainly *looking directly away* from Mrs. Penico. Mr. Penico simply was not in a position to see what he described, peripherally or otherwise. The video evidence conclusively disproved another fact about which Mr. Penico testified," namely "that Mr. Littman had hit him 'several times in the head with both hands' before he (Mr. Penico) turned to flee at the top of the driveway. The videos, however, clearly show that Mr. Littman had struck him twice at most . . . ."

Defendant's conclusion: "Simply put, based on the only reliable and objective evidence, and coupled with Mr. Penico's own concessions, his delayed claim that he saw Mr. Littman strike Mrs. Penico is physically impossible and inherently incredible. For that reason, it must be rejected by this Court on appeal." "The evidence is legally insufficient to support a finding that Mr. Littman performed an act involving a high degree of probability that death would result from a direct contact with Mrs. Penico."

The distillate of defendant's argument is that there is no substantial evidence that Mrs. Penico's death was an unlawful killing, the result of an act committed by defendant, the natural and probable consequences of the act being dangerous to human life, and that when he did that act defendant knew his act was dangerous to human life, and acted with conscious disregard for human life.

" 'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the

circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" [Citation.]' [Citations.]" The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' [Citation.]" (*People v. Cravens* (2012) 53 Cal.4th 500, 507–508.)

With respect to defendant's subargument, we recently stated that " ' "Testimony may be rejected only when it is inherently improbable or incredible, i.e., ' "unbelievable per se," ' physically impossible or ' "wholly unacceptable to reasonable minds." ' " ' " (*People v. Weatherton* (2015) 238 Cal.App.4th 676, 683, fn. 7.) And more than half a century ago this court stated: "It is hornbook law that the credibility of witnesses is the exclusive province of the trier of fact. Furthermore, to warrant the rejection of the testimony of a witness who has been believed by the trial court there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [¶] An appellate court may set aside the verdict of a jury only when there is no substantial or credible evidence in the record to support it or where the evidence relied upon by the prosecution is so inherently improbable or false as to be incredible [citation]. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of the judgment [citations]. It is equally well settled that a jury can give credence to a witness whose testimony is contradictory or inconsistent [citations] or even false in part [citation]." (*People v. Fleming* (1961) 191 Cal.App.2d 163, 169–170.)

That a death resulted is undisputed. We exclude at the outset any thought that defendant was acting in self-defense, for the jury was expressly instructed that finding self-defense meant that defendant had to be acquitted of voluntary manslaughter, so the jury's verdict necessarily rejects self-defense. The verdict also reflects the jury's determination that Mrs. Penico's death was no accident. Defendant thus implicitly accepts that he must be viewed as the aggressor with respect to Mr. Penico. Defendant does dispute that he did an aggressive act with respect to Mr. Penico, but he says as a matter of law there was no such act directed at Mrs. Penico.

Defendant erroneously dismisses Mr. Penico's express testimony that "shortly before I came abreast of her," "I saw peripherally Mr. Littman's hand reach down and strike her in the chest, and I saw her fall backwards." This testimony, which we must assume was credited by the jury, is by itself enough to establish that defendant struck the victim and caused her to fall backward. (Evid. Code, § 411; *People v. Cudjo* (1993) 6 Cal.4th 585, 608–609.) Insofar as the jury rejected more equivocal testimony by Mr. Penico, that is immaterial to assaying for substantial evidence. (*People v. Fleming*, *supra*, 191 Cal.App.2d 163, 169–170; accord, *People v. Crooker* (1956) 47 Cal.2d 348, 355 ["The jury may accept as true a portion of the testimony of a witness and disbelieve the remainder or have a reasonable doubt as to its correctness."]; Evid. Code, § 312, subd. (b) ["the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses"]; *People v. Hrisoulas* (1967) 251 Cal.App.2d 791, 796 ["On appeal that part which supports the judgment must be accepted, not that part which would defeat or tend to defeat it."].) Any other approach brings the reviewing court across the forbidden line of reweighing testimony or determining credibility.

There is another, independent source of substantial evidence. We are here referring to People's Exhibit No. 27, a DVD of pictures from the Penicos' surveillance camera. The camera is aimed down at the spot in the driveway where the Penicos' station wagon was halted, with the driver's door open. It shows Mrs. Penico coming past the open door, going uphill as defendant and Mr. Penico are coming downhill. Remember, we must take defendant as the aggressor, which has him either pushing or driving Mr. Penico in front of him. Just about the moment Mrs. Penico meets them, Mr. Penico appears to move towards the side of the car as Mrs. Penico, with upraised fists, meets defendant. Although Mr. Penico does seem to face the car, and thus have his back turned to his wife and defendant, and although defendant's hands are not visible, we cannot say as a matter of law that Penico's testimony about his peripheral vision satisfies the very high standard for legal impossibility. Put another way, Exhibit No. 27 does not conclusively establish that defendant could not have hit the victim as Mr. Penico testified.

There is more. Even if we assume that no actual blow was landed by defendant, there is a replacement scenario that is equally credible.

Mr. Penico can be viewed as being thrown or pushed by defendant into the side of the vehicle, then bouncing off the opened driver's door, and colliding with his wife and defendant, who were only a couple of feet away. He may have been held by defendant and swung towards Mrs. Penico. Whether Mrs. Penico and defendant were hand-to-hand appears almost certain at the moment Mr. Penico comes into contact with them. Mr. Penico's body hits his wife's left leg, apparently causing her to lose her balance and begin falling backward. Although the grade does not appear to be steep, there is unquestionably an incline. It appears that her head initially hits a part of the driveway that was not sand, but paved with stone. As Mr. Penico regains his footing and moves towards his wife, defendant pushes him over the supine form of Mrs. Penico, propelling him either into the bushes or down the driveway (the camera view was blocked at this point by a tree). The pictures end with Mrs. Penico now face down.

A push can be the proximate cause of a fall just as much as a direct blow. All events were set in motion by defendant. In admitting he was "chasing Mr. Penico *down* their shared driveway" (italics added), defendant must accept that gravity would naturally add to the force of any blow delivered to Mrs. Penico, and would also accelerate the momentum generated from bouncing Mr. Penico off his station wagon. Contrary to what defendant argues in his brief, his responsibility is neither "physically impossible" nor the evidence against him "inherently incredible." And a person falling backward onto a hard stone surface is certainly at risk of severe head injury. (See *People v. Cravens, supra*, 53 Cal.4th 500, 509 [" 'The consequences which would follow a fall upon a concrete walk must have been known to [defendant].' "].)

What defendant did could be found by the jury to constitute the actus reus of voluntary manslaughter. The jury could determine that what he did was, in the language of CALCRIM No. 620, a substantial factor in Mrs. Penico's death and thus, in the language of the modified version of CALCRIM No. 580 given to the jury, he "committed a crime that posed a high risk of death or great bodily injury because of the way in which

it was committed." These formulations restate the concept of proximate cause, which is an issue of fact. (E.g., *People v. Roberts* (1992) 2 Cal.4th 271, 320, fn. 11; *People v. Dawson* (2009) 172 Cal.App.4th 1073, 1090, fn. 4.) We further note that defendant does not challenge any aspect of his assault conviction, which was for assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), and which undercuts his arguments that nothing he did had the potential for causing serious injury and that he had no appreciation of such a danger.

The evidence in the record demonstrates an ample basis for the jury to conclude that the application of considerable force causing the backward and downward fall of a person's uncovered head onto a stone surface could result in a least great bodily injury, and, if death resulted, that it constituted voluntary manslaughter. The record also has substantial evidence, in the form of Mr. Penico's testimony, that the fatal chain of events was initiated with a direct assaultive blow by defendant. Neither of the two theories is physically impossible or legally inadequate.

The Trial Court Did Not Give "Argumentative" Instructions That Constituted an Improper Comment on "Critical Defense Evidence"

The trial court conducted an extensive hearing pursuant to Evidence Code section 402 in connection with defendant's "Motion in Limine to Include Computer Animation." The purpose of the motion was explained in the moving papers as follows:

"It is anticipated that the prosecution will seek to admit evidence of a video recording of the incident (surveillance footage retrieved from the scene) and an enhanced version of the video recording as part of its case in chief. As such, defense seeks to introduce an animation depicting the footage that will be relied upon by defense expert Dr. Peter Francis during his testimony. Dr. Francis, an expert in biomechanics, will analyze and interpret the events depicted on the video footage. In addition, the computer animation will provide the tool that allows Dr. Francis to explain and convey his opinions and conclusions to the jury. [¶]. . .[¶] The video should be introduced as illustrative evidence, much like graphs or charts, and therefore is subject only to the standards of Evidence Code section 352 and the *Frye-Davis* test for substantive evidence. The

animation is relevant to the question of malice aforethought and causation and as such, Dr. Francis will rely upon the animation to explain his opinion to the jurors."

The scope of the hearing was broader than defendant's moving papers would indicate, as shown by the trial court's detailed ruling, which occupies six pages in the reporter's transcript. Prior to stating its rulings on admissibility of evidence and testimony, the court added: "The jury will be instructed if there is an animation used that it's not a simulation and doesn't purport to be an exact reproduction or duplication of precisely what happened . . . ." And at the end of its rulings, the court reiterated that the jury would be instructed on the purpose of the animation.

Immediately before the animation was shown to the jury during Dr. Francis's testimony, the court was instructed as follows:

"Before we show it, ladies and gentlemen, this is what is called an animation, not a simulation. Those words have two different meanings.

"A 'simulation' would be somebody's attempt to show what they believe exactly happened. That is something like, let's say, a reconstruction expert would say, This is precisely what happened when these two cars crashed into each other.

"This is an animation. It's not evidence. It's simply a representation of the expert's opinion about what may have happened. So it's not—this item is not going to go into evidence. It doesn't purport to be and *you cannot conclude that it is an exact duplication of the precise events that took place*. However, it is provided to you as an aid or a help to you in understanding Mr. Francis' opinion. That's the only purpose of it." (Italics added.)

At the prosecution's request, and with the defense's approval ("that's fine"), the court included a special instruction in its final instructions to the jury: "During the trial you saw a video animation played during the course of witness Peter Francis' testimony. The exhibit was presented solely as an illustration of Mr. Francis. It was not admitted into evidence by the Court. *You should not consider it as evidence reflecting a precise reenactment of the events depicted in all respects*." (Italics added.)

Defendant now contends the italicized language in the instructions "were argumentative pinpoint instructions and constituted a . . . comment on the evidence" prohibited by article VI, section 10 of the California Constitution.[2] Anticipating that the Attorney General would interpret trial counsel's acquiescence as forfeiting review, defendant argues the issue is preserved for appeal. But the Attorney General frustrated defendant's prediction, merely arguing that the instructions were not erroneous. We agree with the Attorney General.

The entire issue of animation vs. simulation traces to our Supreme Court's decision in *People v. Duenas* (2012) 55 Cal.4th 1, which was argued at length before the trial court at the pretrial hearing. The Supreme Court noted:

"Courts and commentators draw a distinction between computer animations and computer simulations. [Citation.] 'Animation is merely used to illustrate an expert's testimony while simulations contain scientific or physical principles requiring validation. [Citation.] Animations do not draw conclusions; they attempt to recreate a scene or process, thus they are treated like demonstrative aids. [Citation.] Computer simulations are created by entering data into computer models which analyze the data and reach a conclusion.' [Citations.] In other words, a computer animation is demonstrative evidence offered to help a jury understand expert testimony or other substantive evidence [citation]; a computer simulation, by contrast, is itself substantive evidence [citations].

"Courts have compared computer animations to classic forms of demonstrative evidence such as charts or diagrams that illustrate expert testimony. [Citations.] A computer animation is admissible if ' "it is a fair and accurate representation of the evidence to which it relates . . . ." ' [Citations.] A trial court's decision to admit such demonstrative evidence is reviewed for abuse of discretion. [Citations.] A computer simulation, by contrast, is admissible only after a preliminary showing that any 'new scientific technique' used to develop the simulation has gained 'general acceptance . . . in

[2] Which provides, in relevant part: "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."

the relevant scientific community.' [Citations.]" (*People v. Duenas*, *supra*, 55 Cal.4th 1, 20–21.)

Defendant does not dispute the trial court's conclusion that the video depiction was an animation, and not a simulation. Nor does he tell us that the trial court abused its discretion in ruling as it did. Defendant thus must concede he accepts the *Duenas* distinction that an "animation is demonstrative evidence offered to help a jury understand expert testimony" but "is itself [not] substantive evidence." As this is precisely what the court's instructions told the jury, we are hard put to determine precisely how the trial court erred, particularly in a situation where it had the express approval of defense counsel who told the court he had no problem with reiterating the second instruction, which is clearly based on *Duenas*.[3] We are not inclined to allow defendant to take an obvious issue of an instruction and repackage it as one of the trial court commenting on Dr. Francis's testimony.

The Trial Court's Exclusionary Rulings Did Not Violate Defendant's Due Process Right to Present a Defense

Defendant contends that a pair of rulings by the trial court prevented him from presenting his defense to the jury. The rulings were made during the testimony of Mrs.

[3] "The trial court also gave the jury this cautionary instruction: 'What you're going to see is an animation based on a compilation of different expert opinions. This is similar to the expert using charts or diagrams to demonstrate their respective opinion. *This is not a film of what actually occurred or an exact re-creation. It is only an aid to giving you a view as to the prosecution version of the events based upon particular viewpoints and based upon interpretation of the evidence.*' (Italics added.)" (*People v. Duenas*, *supra*, 55 Cal.4th 1, 18.) The Supreme Court clearly approved: "[W]e are confident that the jurors understood the animation's limited role . . . . The trial court's cautionary instruction . . . is one of several factors that distinguish this case from the decision of the Oklahoma Court of Criminal Appeals in *Dunkle* . . . , on which defendant primarily relies." The court concluded "[T]he trial court in *Dunkle* had failed to give an instruction informing the jury about how it should understand and evaluate the animations. [Citation.] Here, by contrast, . . . the trial court appropriately instructed the jury that the animation was not an exact recreation and only showed the prosecution's version of the events."].) (*People v. Duenas*, *supra*, at p. 24.)

Littman, the second person called by the defense. The background to the rulings, and the context in which they were made, must be described at some length.

Prior to start of the trial, defendant proposed that the jury should hear testimony from four of Mrs. Penico's neighbors about her behavior and reputation prior to her death, the theory being the evidence showed a pattern of aggressive conduct towards her neighbors that was admissible under Evidence Code section 1103. The proposed testimony was heard by the court at a hearing held in accordance with Evidence Code section 402, and was ultimately, if only tentatively, ruled inadmissible until the question of defendant acting in self-defense was put at issue before the jury. As already shown, the issue of self-defense did arise, so defendant does not assign this ruling as error. Nevertheless, what developed at the hearing is pertinent to the argument defendant does prosecute on this appeal.

Mrs. Penico had practiced law in the Washington, D.C. area prior to she and her husband (also an attorney) moving to California. A recurring theme of the proposed testimony was that, since coming to Stonegate Drive, she had an abiding concern with seeing that the rules of the homeowners association were enforced. Her particular favorite was summoning police and seeing that fines were imposed for violating the association's rule against parking cars on the streets.

Armed with this knowledge, defense counsel told the jury in his opening statement that the victim transferred this proclivity to the Littmans, literally from the day they moved in, thereby setting the tone for what followed: "The very first day, the contentious relationship started. [¶] For the next eight years, the Littmans put up with Doris' obsessive behavior that dealt with the easement, that dealt with property lines, that dealt with Homeowner's Association rules. Any perceived violation that she saw the Littmans commit, she reported it to the HOA, Homeowner's, Association, or to the county building department or she called the police. And she had quite a history of calling the police out to her property." During the discussions during the pause in Mrs. Littman's testimony, the court heard argument concerning what appears to have been some kind of writing from the defense specifying a number of evidentiary items or issues. The court then

stated: "So my view on all of that, all of the stuff relating to the backyard, the fence, who put up what fence, the Homeowner's Association, I'm excluding it unless and until we get to the point after Mrs. Manoukian has cross-examined that you think you want to revisit it because Mrs. Manoukian has opened the door on that."

After discussion of some possible scenarios and how they might impact what could be introduced, defense counsel then initiated the following:

"THE COURT: Anything else?

"MR. CARDOZA: The Homeowner's Association, I think she talked about. I think Mrs. Littman could certainly speak to that about how strict the Homeowner's were and how invasive right down to what color petunias you could plant.

"THE COURT: Why do I care?

"Why do I care if they have a thought police or storm trooper's association to try to regulate your behavior in a way you would otherwise not like. You buy into the place, you buy into the Homeowner's Association. I understand you might not understand what you are getting into when you—this wouldn't be the first time where—that I have heard of—where homeowner's associations are allegedly stocked with people who have nothing better to do than telling other people what to do down to minute details. That is what happens when you buy into a homeowner's association property. I'm not sure why any of that would be relevant to what happened on the 27th.

"MR. CARDOZA: The reason I believe it to be relevant is because we have a plethora of photographs of impliedly my client taking photographs of the Penicos, but it's because they perceived that they are violating the Homeowner's Association because Mrs. Penico's persistently and constantly reports them for any slight violations. So it's tit-for-tat, you report us, every time you do something, we're going to the Homeowner's that you do something too. And the same rules don't apply to you, so they begin to take pictures. That's how invasive these Homeowner's rules are.

"THE COURT: I understand your argument. Again, I'm willing if you want to draft an instruction that makes clear to the jurors that neither the Homeowner's Association, its rules or any legal dispute about the Homeowner's Association rules is

relevant to their decision making here. But that to me, the worst thing I could possibly do is open up this Pandora's Box of the Homeowner's Association and their attempts to regulate whoever they choose to regulate and pick on one person and not pick on another person, that just—even though that may have been the fact of the matter, it's just not relevant to this case and I allowed in the specific evidence that I think addresses that to a significant degree and that is that the Littmans had an attorney and the attorney advised them to make a photographic record—

"MR. CARDOZA: Okay.

"THE COURT: —of things.

"MR. CARDOZA: I don't think there is anything else.

"MS. MANOUKIAN: I actually moved to exclude—

"THE COURT: Let me make sure we're done with Mr. Cardoza, he was—

"MR. CARDOZA: And then I have another issue we may as well address.

"THE COURT: So you said, I don't think there is anything else and then you said, by the way, there is another issue.

"MR. CARDOZA: Who me?

"THE COURT: Yes.

"MR. CARDOZA: Not in relation to that. This is another issue.

"She will testify as to that nighttime video and the earlier video when we called [*sic*: culled] it out because of an earlier discussion, but the reason that nighttime video was taken was because the Penicos were fighting and they take the nighttime video. That's why they did it. [¶] . . . [¶]

"THE COURT: Excuse me. You think that is going to be a good explaining [*sic*: ex[planation] for the jury that they though it was okay to take a photograph because the next door neighbor was fighting?

"MR. CARDOZA: Whether it's good or bad, that's what it was. I'm not an arbiter of the facts. The cards are dealt, I play them. That's the best I could do. That's the explanation.

"THE COURT: Since that was used by the other side, I will certainly allow her to testify.

"MS. MANOUKIAN: It wasn't.

"MR. CARDOZA: What wasn't used?

"THE COURT: The photograph of the two windows at night?

"MS. MANOUKIAN: That was used, yes.

"THE COURT: I understood you to say that particular one, the two windows in the dark in the night and that was the reason for that—

"MR. CARDOZA: Yes.

"THE COURT: —video.

"MR. CARDOZA: Yes. Okay.

"In the video before, she will testify that they were fighting a lot that day. We could hear them fighting. In one of the videos, if you remember this day Mr. Penico and Mrs. Penico walk in the house, we cut it off, but you could hear them arguing. I want to play that video for the jury to show we're not making this out of whole cloth. These guys were fighting. You could hear it on that earlier video because my clients were saying they were having at each other most of that day and on one of the videos, you could hear them at each other. I want to play that.

"THE COURT: I'm not going to let you play it.

"MR. CARDOZA: May I ask why? It corroborates my client's statement.

"THE COURT: 352. Adults argue all of the time. Husbands and wives argue all of the time. The fact that they have argued more than once doesn't really justify in my mind if one photograph that was used was by—

"MR. CARDOZA: It's not a photograph.

"THE COURT: —the video.

"By most people's accounts, you had the lawyer giving advice to the Littmans suggesting that they take videos with audio or not at night and it would have been shocking to say the least. But obviously the limits of her advice were to take photographs

and video relevant to whatever dispute show she [was] advising them about, not arguing in the middle of the night.

"I just—to me, it may be an anomaly. There are other anomalies in the case perhaps of Mrs. Penico zooming in on the front door of the Littman residence and the implications of that. You got into that. There is evidence before the jury of Mrs. Penico doing somewhat the same thing.

"Obviously to the extent both sides step over an appropriate line here as to what they were doing as far as surveillance is concerned, that is going to be in front of the jury with respect to both of the households. To now expand that into other instances where the Littmans also took an additional video, if Mrs. Manoukian wanted to offer that, fine. But you are using it to suggest that somehow the second video of the Penicos arguing justifies the first, I don't see that.

"MR. CARDOZA: Well, just so—I want to be clear that you understand, maybe I wasn't clear. On the day the nighttime video was taken, hours before that, just hours before that, Mr. and Mrs. Penico were on the driveway with the Whitefords. They walk in the house, same day, just hours apart and they have at it [*sic*] each other in the house. It's very close in time. So it's corroborating my client saying, They were arguing and it was, you know, a big argument. So for our reasons, we took video.

"And that earlier argument just hours before shows she's not making this up out of whole cloth. You could hear them arguing on that date. So as opposed to being attacked, oh, well, how do we know they were arguing? Blah, blah, blah. And it's no, this shows they were arguing. So—

"THE COURT: Notwithstanding your presentation there, putting it in the best light for admissibility as you possibly could I'm excluding it under 352."

We now address the rulings separately.

(1)

Defendant reasons: "A defendant may be found guilty of the crime of stalking where he maliciously harasses and threatens another. PC § 946.9(a). Harassment includes a course of conduct that is directed at a specific person and that, *inter alia*,

'serves no legitimate purpose.'[4] Thus, to succeed on a harassment theory of stalking, the prosecution must prove, as an offense element, the absence of legitimate purpose beyond a reasonable doubt." So, "[i]n this matter, evidence of the homeowners association rules and Mrs. Penico's related complaints about the Littmans was directly relevant to the intent/legitimate purpose element of the stalking count."

One of the reasons for the extensive excerpts quoted above was to establish the absence of the words "stalking," "harassment," "legitimate purpose," "course of conduct," or "section 646.9," which calls into question whether "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court," thus preserving the issue for review. (Evid. Code, § 354, subd. (a); *People v. Ervine* (2009) 47 Cal.4th 745, 783.)

What the court was told was that the defense thought the evidence was "relevant . . . because we have a plethora of photographs of impliedly my client taking photographs of the Penicos, but it's because they perceived that they are violating the Homeowner's Association because Mrs. Penico's persistently and constantly reports them for any slight violations. So it's tit-for-tat, you report us, every time you do something, we're going to the Homeowner's that you do something too. And the same rules don't apply to you, so they begin to take pictures. That's how invasive these Homeowner's rules are." This was a far more diffuse theory of admissibility, which

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[4] Defendant means section 646.9, the pertinent portions of which provide:

"(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . . . [¶] . . . [¶]

"(e) For the purposes of this section, 'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.

"(f) For the purposes of this section, 'course of conduct' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of 'course of conduct.' "

clearly accounted for the trial court characterizing it as a "Pandora's Box of the Homeowner's Association" that was "just not relevant to this case." With its extensive knowledge from the pretrial hearing of what testimony the defense was likely to offer, the court's comments must be accorded additional weight.

Had defendant actually made the argument he now does, and had the trial court accepted that the evidence met the definition of relevance, it is exceedingly unlikely that the court would have let the jury hear it. Given its comments about the evidence, the court would very probably have excluded the proposed testimony using Evidence Code section 352. Some speculation is naturally involved, but it is reasonable to conclude the court would not have allowed the "Pandora's Box" to distract the jury.

At the pretrial hearing, the court heard from four residents in the neighborhood. Whether these four persons would suffice to prove a course of conduct amounting to harassment, or whether more would need to be called, was not clarified by defense counsel. The issue is further muddied by several of the witnesses conceding that some of the complaints made by Mrs. Penico were valid. The court had also heard 19 pages of argument concerning whether the Penicos installation of a video surveillance system could be relevant on the point defendant now advances. In language it would later repeat, the court rebuffed defendant: "No. . . . I'm not going to allow you to get into this so-called pattern of conduct. I don't see the connection between the pattern and an expressed fear of the immediate neighbor and the nature of the video surveillance that's installed here reflecting upon her that she's just—basically this is consistent with her spying on her neighbors as opposed to a legitimate fear of the neighbor. [¶] I just think under 352 this is just opening up a can of worms and Pandora's box in this case and I'm not prepared to do that."

In light of these circumstances, we cannot discern any reasonable probability that the trial court would have changed its mind and permitted the jury to hear defendant's "pattern of conduct" evidence. No abuse of the broad discretion vested in the trial court by Evidence Code section 352 has been established. (*People v. Williams* (2008) 43 Cal.4th 584, 634–635)

(2)

Defendant contends that the video made on the night of February 19, 2012 was "clearly relevant to a material issue, i.e., Mr. Littman's reasons for being involved in taking the video. This had an obvious bearing on whether he was stalking Mrs. Penico. It was an abuse of discretion to exclude the video" This claim is without merit.

Unlike the preceding discussion, here the trial court unquestionably exercised the discretion granted it by Evidence Code section 352. " 'Although we recognize that a criminal defendant has a constitutional right to present all relevant evidence of *significant* probative value in his favor [citations], "[t]his does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than 'slight-relevancy' to the issues presented." [Citation.]' " (*People v. Homick* (2012) 55 Cal.4th 816, 865.)

The issue is a single video. Clearly, it was not the making of the video that defendant sought to put before the jury, but the fact that the Penicos were having a heated domestic argument. Defense counsel told the court the video "corroborat[es] my client saying, They were arguing and it was, you know, a big argument." Relevance to the stalking charge was not mentioned. The video was made more than six months before the date of Mrs. Penico's death. As counsel conceded, it only corroborated what Mrs. Littman had already testified about before the jury. So, the issue is just one small aspect of the Littman-Penico history of antagonism. It would be hard to imagine a stronger example of cumulative evidence on a collateral matter, a textbook category of what our Supreme Court called " ' " 'slight-relevancy,' " ' " and which the United States Supreme Court called "repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) This constitutes an area where a trial court's exclusionary power is broad. (E.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1291; *People v. Frye* (1998) 18 Cal.4th 894, 946; *People v. Lavergne* (1971) 4 Cal.3d 735, 744.) It was not abused in this instance.

(3)

Defendant presents a separate contention that "the cumulative effect of the trial court's evidentiary rulings . . . constituted a prejudicial violation of the federal constitution." The predicate for this contention is that we conclude the two exclusionary rulings just discussed were erroneous. But the preceding discussion establishes that the presumed predicate is not present.

DISPOSITION

The judgment of conviction is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Miller, J.

A143133; *P. v. Littman*